Supreme Court, U.S.
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No. 85-1370

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

v.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

REPLY BRIEF FOR APPELLANT

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DESIGNATION OF CORPORATE RELATIONSHIPS

Arkansas Writers' Project, Inc., filing this Reply Brief of Appellant in this proceeding, states that:

This is its third Designation of Corporate Relationships. The Desig-

nations that were previously filed are currently accurate.

Dated: January 9, 1986

BEST AVAILABLE COPY

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The Appellee's Brief contains several incorrect or misleading statements regarding both the facts and the law. In addition, the arguments advanced by Appellee that Appellant lacks standing, that the "rational basis" test should apply, and that the State's classifications are rational are unsupported by

any cases or persuasive legal analysis.

The inaccuracies are as follows:

On page 1, it states that no declaratory judgment action was filed by Appellant. The prayer of Appellant's Complaint (Joint Appendix p. 5) does seek a declaratory judgment.

Also on page 1, it states that "all other magazines" pay sales tax, thereby implying that there are a vast number of magazines, all paying sales tax. A similar misleading comment is on page 13, where Appellee says that "the vast majority of magazines sold in this State...are subject to the Arkansas sales tax..." Alan Leveritt, the publisher of Arkansas Times, stated in his affidavit (Joint Appendix, pp. 12-13) that Arkansas Times was, to his knowledge, the only magazine which was taxed on its subscription sales. The affidavit of Gale Price of the Revenue Department (Joint

Appendix, pp. 19-20) stated that Arkansas Times was not the only magazine so taxed, but failed to name any other publications or even to state how many, if any, were taxed on subscription sales. It is conceded that consumers are charged sales tax on over-the-counter sales of magazines.

On page 3, Appellee implies that Appellant recognizes that a tax imposed on sales of publications is not unconstitutional. Appellee does not state where Appellant "recognizes" this principle. Appellant does not recognize that a tax on sales of publications is constitutional. However, a ruling on this issue is not necessary to the determination of this case.

Also on page 3, Appellee claims that Appellant believes that the State can create classifications of publications which have a rational basis. This is

simply not true, as Appellant has strongly argued that a state must have a compelling reason for selecting particular publications for taxation where other publications are exempt.

Aside from these inaccuracies, Appellee's arguments are unsupported. Appellee claims on page 4 that there is no "case or controversy," on the assumption that the only remedy is a finding that the exemptions themselves are unconstitutional. Regardless of whether the remedy is a revocation of the exemptions or their extension to Appellant, Appellant has standing. The reason is expressed in Heckler v. Matthews, 465 U.S. 728 (1984). Matthews involved social security benefits payable to spouses. Until this Court ruled in Califano v. Goldfarb, 430 U.S. 199 (1977), that a gender-based classification violated the right to equal pro-

tection guaranteed by the Fifth Amendment, wives and widows were entitled to receive spousal benefits regardless of whether they were dependent on their husband, while husbands and widowers had to prove dependency in order to receive spousal benefits. After Goldfarb, Congress enacted legislation requiring government pensions to be offset against spousal benefits, except that government pensions of wives and widows, and dependent husbands and widowers, who qualified for benefits prior to December 1982 were not offset against social security spousal benefits. A severability clause provided that if the discrimination were ruled invalid, the exemption would be invalid. Therefore, at issue was whether the severability clause, if valid, would deprive the appellee of standing by eliminating any possibility that he would receive social security benefits.

This Court pointed out that there are two remedial alternatives to be under-inclusive scheme: to nullify the statute and order that the benefits not extend to the class that the legislature intended to benefit, or to extend the coverage to include those aggrieved by the exclusion. 465 U.S. at 738. Whether a court imposes the remedy of extension or of nullification would depend on the nature of the statute, the commitment of the legislature to nullification as opposed to extension, and the degree of potential disruption that would occur by extension rather than abrogation. 465 U.S. at 738, n.5. Since the wrong complained of is the unequal treatment, either alternative would remedy the situation.

The exemptions in issue are under-inclusive and discriminate against Appellant. Although either nullification

of the exemptions or their extension to Appellant would remedy the unequal treatment, the probable remedy is to extend the exemption to include Appellant, as this Court has done in similar cases involving bans on picketing where particular categories of speech were exempted from the ban. Police Department of Chicago v. Mosely, 408 U.S. 92 (1972); Carey v. Brown, 447 U.S. 455 (1980). Rather than declaring the exemptions to be unconstitutional, this Court held the bans to be unconstitutional because unequally applied. Similarly here, it is the unequal application of the tax and not the exemption which should be declared unconstitutional.

In Armco v. Hardesty, 467 U.S. 638 (1984) an out-of-state manufacturer successfully challenged, on Commerce Clause grounds, a state use tax because the state exempted in-state manufacturers

from sales tax. The remedy was not to strike the exemption, but to include out-of-state manufacturers in the exemption by holding that the discriminatory scheme was invalid.

Since the taxing scheme is unconstitutionally underinclusive, and the unequal imposition of a tax on Arkansas Times is therefore unconstitutional, there is a "case or controversy" before the Court and Appellant has standing regardless of which of the two remedies is ultimately found to be most appropriate.

On pages 8-9, Appellee states that its failure to present evidence in support of its justifications for the taxing scheme was due to the fact that the case was decided on a motion for summary judgment. Aside from the fact that factual material, in the form of affidavits and depositions, can be (and

was) presented in response to our motion for summary judgment (see Affidavit of Gail Price, Joint Appendix, pp. 19-20), the State also conceded in connection with the summary judgment motion that no factual disputes remained. In the parties' Joint Stipulation (Joint Appendix, pp. 21-22), the parties submitted the case to the court upon the pleadings, briefs, and stipulations. Appellee had ample opportunity to present factual material. It cannot now complain of the lack of evidence in support of its position.

Several more misstatements are made on page 15. Appellee states that this Court "affirmed" two lower court decisions, where in fact the appeal in each case was dismissed. Matter of the Assessment of Additional North Carolina and Orange County Use Taxes Against Village Publishing Corporation, 312 N.C.

211, 322 S.E. 2d 155 (1984), appeal dismissed, 105 S. Ct. 2693, (1985) and Chicago Tribune Company v. Johnson, 106 Ill. 2d 63, 477 N.E. 2d 482 (1984), appeal dismissed, 106 S. Ct. 241 (1985). Appellee also states that these cases involve exemptions from a tax favoring one media organization over another. Neither of these cases involve such an exemption.

The North Carolina case involved a use tax imposed where a publisher purchased copies of its paper from the printer. There was an exemption for sales of newspapers by street vendors and delivery boys which the appellant argued should be applied to its purchases from its printer. However, the discrimination was on the basis of the method of delivery and not the type of publication or its content. Thus, one media organization was not favored over the other, as

is suggested by Appellee on page 15 of its brief.

Similarly, in Chicago Tribune v. Johnson, sales of manufacturing equipment used to produce tangible personal property for sale were exempt from taxation, except that sales of printing equipment were not exempt. The statutes did not favor one media organization over another.

The Appellee cites few cases in support of its position, and several of the few are mis-cited. Appellee cites no case where this Court has upheld a tax imposed against one type of publication and not another; or where this Court has upheld any content-based discrimination. On the other hand, the Brief of Appellant and the briefs of amici curiae filed on behalf of Appellant demonstrate that the First Amendment, as interpreted in the various cases cited in such briefs, prohibits the type of discrimination at

issue in this case.

Appellant therefore renews its requests for the relief which it previously made.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has served the foregoing Reply Brief, by placing three copies of same in the U.S. Mail, first class, postage prepaid, this 9th day of January, 1987, addressed to John Steven Clark, Attorney General of Arkansas, Heritage West Building, Suite 120, Little Rock, Arkansas, 72201.

ANNE OWINGS WILSON